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Paper No. 9
CEW

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Stephanie M. Fredericks

Serial No. 75/153,801

Charles Fredericks, Jr., Esq. for Stephanie M.
Fredericks.

Anthony J. Tambourino, Trademark Examining Attorney, Law
Office 107 (Thomas Lamone, Managing Attorney).

Before Seeherman, Walters and Bottorff, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Stephanie M. Fredericks has filed a trademark
application to register the mark FLORENA for "toiletries,
namely, non-medicated creams for face, hands, body and
feet, personal deodorants, non-medicated shampoo and
conditioner."¹

The Trademark Examining Attorney has finally refused
registration under Section 2(d) of the Trademark Act, 15

¹ Serial No. 75/153,801, in International Class 3, filed October 26,
2000, based on an allegation of a bona fide intention to use the mark in
commerce.

U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark FLORENE, previously registered for "perfume and cologne, skin soaps, essential oils for use in manufacturing cosmetics and perfume, and cosmetics, namely, foundation make-up, blushes and eyeliners,"² that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

The Examining Attorney contends that the only difference between FLORENA and FLORENE is the final vowel, and that the marks look and sound almost identical. Regarding the goods, the Examining Attorney contends that "applicant and registrant ... sell the same type of personal care products."

Applicant contends that the marks are different because they have different connotations - FLORENE having a chemical connotation and FLORENA having a floral connotation; that the marks differ visually because of the different final vowels; that the marks have different

² Registration No. 2,152,669 issued April 21, 1998, to Colorado Medical Center, in International Class 3.

overall commercial impressions; and that applicant can present a unique character to its mark though distinctive packaging. Applicant argues that the goods differ because applicant sells to the consumer, whereas registrant sells to the trade.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

We turn, first, to a determination of whether applicant's mark and the registered mark, when viewed in their entirety, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when

subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

As the Examining Attorney notes, the marks contain identical letters except for the final letter, which in both marks is a vowel. When determining similarity of marks for purposes of likelihood of confusion, there is no one "correct" pronunciation for a mark, so it is possible that FLORENA and FLORENE may be pronounced substantially similarly or identically. Applicant stated in its first response that FLORENA is "a made up word"

and the record contains no evidence other than speculation regarding any connotations of either FLORENA or FLORENE. Therefore, we can conclude only that both marks are invented terms. Further, we must consider the marks that are the subject of the application and registration, thus, applicant's allegations regarding distinctive packaging are irrelevant.

We conclude that applicant's mark and the registered mark, when viewed in their entirety, are substantially similar in terms of appearance, sound, connotation (or lack thereof) and commercial impression.

Turning to consider the goods involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need not be

identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

Unfortunately, the Examining Attorney has presented no evidence regarding the similarity of the goods involved herein and there is no per se rule regarding similarity or relatedness of toiletries. Thus, we draw no conclusion regarding the relatedness of most of applicant's goods to most of registrant's goods. Nonetheless, we find that applicant's non-medicated creams, shampoo and conditioner are sufficiently related to registrant's skin soaps, as their uses are complementary, for the skin and scalp, and are for cleaning and moisturizing purposes, that consumers are

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likely to believe that these products, if identified by substantially similar marks, come from the same source.

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, FLORENA, and registrant's mark, FLORENE, their contemporaneous use on the related goods indicated herein is likely to cause confusion as to the source or sponsorship of such goods.

Decision: The refusal under Section 2(d) of the Act is affirmed.